

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Amendment to Rules of
Practice and Procedure

Docket No. RM2022-4

PUBLIC REPRESENTATIVE COMMENTS ON PROPOSED RULES
RELATING TO MOTIONS FOR RECONSIDERATION

(May 26, 2022)

On April 5, 2022, the Commission issued a notice of proposed rulemaking proposing amendments to the Commission's rules of practice and procedure relating to motions for reconsideration of final Commission orders.¹ The proposed rules "reflect the Commission's current practice of hearing timely motions for reconsideration of its final orders." Order No. 6141 at 2. The Commission sought comments and appointed the undersigned Public Representative. *Id.* at 3-4.

The Public Representative has reviewed the proposed rules, similar rules from other federal agencies, and recent filings in Commission proceedings related to motions for reconsideration. The language of the proposed rules is consistent with those from other agencies. The Public Representative supports adopting rules that set forth procedures and timelines for filing motions for reconsideration because several parties have filed them in recent Commission proceedings. She supports the proposed rules, but recommends that the Commission revise them to clarify how a motion for reconsideration affects the deadline for filing a petition for review with the United States Court of Appeals for the District of Columbia (D.C.) Circuit under 39 U.S.C. § 3663. She also recommends that the Commission consider adding language specifying a response period and Commission action on motions for reconsideration.

¹ Notice of Proposed Rulemaking to Amend Rules Regarding Notices, Motions, and Information Requests, April 5, 2022 (Order No. 6141).

I. DEADLINE FOR FILING A PETITION FOR REVIEW

Neither the Postal Accountability and Enhancement Act nor the Commission's current rules expressly allow interested persons to file motions for reconsideration, establish a deadline for when these motions must be filed, or explain how motions for reconsideration affect the time period for filing a petition for review under 39 U.S.C. § 3663. Proposed § 3010.165(b) clarifies that a motion for reconsideration must be filed within 15 days after the Commission issues a final order. Order No. 6141 at 5. However, the proposed rules do not specify the deadline for filing a petition for review under 39 U.S.C. § 3663 when a motion for reconsideration is filed. Section 3663 allows "a person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission" to initiate an appeal with the D.C. Circuit by filing a petition for review "within 30 days after such order or decision becomes final" The 30-day time period could begin on the date the Commission issues the final order or decision being reconsidered or on the date the Commission resolves the motion for reconsideration.

Some parties who filed a motion for reconsideration with the Commission also filed a petition for review with the D.C. Circuit to preserve their right to appeal under section 3663. For example, recently the Postal Service simultaneously filed a motion for reconsideration and a petition for review regarding the Commission's directive in the FY 2021 *Annual Compliance Determination* (ACD) regarding Bound Printed Matter Parcels.² In its petition for review, the Postal Service acknowledged that it may not simultaneously pursue agency reconsideration and judicial review of the same Commission order, but explains that it filed the petition for review "as a protective measure so that it does not risk losing the ability to obtain judicial review of the [FY 2021 ACD]." Petition for Review at 1-2, n.1. It stated it did not know whether the Commission would deem its motion for consideration timely or would address it on the merits. *Id.* The Postal Service pointed out that by the time the Commission decides to address the motion on the merits or dismiss it as untimely, the 30-day time period under 39 U.S.C. § 3663 would have passed. *Id.*

Based on current practice before the Commission, a motion for reconsideration appears to toll the 30-day time period for filing a petition for review until the Commission has resolved the motion. For example, in Docket No. RM2020-9, the Commission issued Order No. 6048 denying United Parcel Service, Inc.'s (UPS) proposed changes to costing methodologies on November 29, 2021.³ UPS filed a motion for reconsideration on December 28, 2021, 29 days after Order No. 6048 was issued.⁴ The Commission issued an order denying UPS's motion for reconsideration on January 28, 2022, and UPS filed a petition for review with the D.C. Circuit on February 25, 2022, 28 days later.⁵ The D.C. Circuit appears to have accepted the petition for review as timely because it subsequently issued an order setting deadlines for UPS to submit certain documents.⁶

Current practice before the Commission is also consistent with federal court decisions establishing a "tolling rule" regarding motions for reconsideration and judicial review. In *Stone v. Immigration and Naturalization Service (I.N.S.)*, the Supreme Court stated that under both the Administrative Procedure Act and the Hobbs Act:

The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. In consequence, pendency of reconsideration renders the underlying decision not yet final, and it is implicit in the tolling rule that a party who has sought rehearing cannot seek judicial review until the rehearing has concluded.⁷

Similarly, in *Bellsouth Corp. v. Federal Communications Commission (F.C.C.)*, the D.C. Circuit stated that a petition for reconsideration rendered an F.C.C. order nonfinal and that

² Docket No. ACR2021, United States Postal Service Motion for Reconsideration of Directive Regarding Bound Printed Matter Parcels, April 28, 2022; Petition for Review, *U.S. Postal Service v. Postal Regulatory Comm'n*, No. 22-1068 (D.C. Cir. filed April 28, 2022) (Petition for Review).

³ Docket No. RM2020-9, Order Rejecting United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposal One), November 29, 2021 (Order No. 6048).

⁴ Docket No. RM2020-9, United Parcel Service, Inc.'s Motion for Reconsideration of Order No. 6048, December 28, 2021.

⁵ Docket No. RM2020-9, Order Denying United Parcel Service, Inc.'s Motion for Reconsideration of Order No. 6048, Jan. 28, 2022 (Order No. 6097); Petition for Review, *United Parcel Service, Inc. v. Postal Regulatory Comm'n*, No. 22-1029 (D.C. Cir. filed Feb. 25, 2022).

⁶ Order, *United Parcel Service, Inc. v. Postal Regulatory Comm'n*, No. 22-1029 (D.C. Cir. filed March 1, 2022).

the petitioner may timely seek judicial review of the final order when the F.C.C. acts upon the petition for reconsideration.⁸ However, in *City of Colorado Springs v. Solis*, the Tenth Circuit did not apply the tolling rule because the Department of Labor had not established a rehearing or reconsideration procedure.⁹

Thus, the Public Representative recommends revising the proposed rules to clarify the deadline for filing a petition for review under 39 U.S.C. § 3663 when a motion for reconsideration is filed. The revised rules could use language such as: “If any party files a timely motion for reconsideration, the 30-day time period for filing a petition for review with the D.C. Circuit under 39 U.S.C. § 3663 shall begin on the date the Commission issues the final order resolving the motion for consideration.”¹⁰

II. RESPONSE PERIOD AND COMMISSION ACTION

After reviewing motion for reconsideration rules from other agencies, the Public Representative recommends that the Commission consider adding language specifying a response period and Commission action on these motions. In general, the Commission’s rules of practice of procedure allow persons to file responses to written motions “within seven days after the motion is filed and posted on the Commission’s website”¹¹ The Commission may want to set a specific response period for motions for reconsideration. The rules could also specify how the Commission will address these motions. For example, the Commission could grant or deny the motion, or take other appropriate action.

⁷ *Stone v. I.N.S.*, 514 U.S. 386, 392 (1995).

⁸ *Bellsouth Corp. v. F.C.C.*, 17 F.3d 1487, 1490 (D.C. Cir. 1994).

⁹ *City of Colorado Springs v. Solis*, 589 F.3d 1121, 1131 (10th Cir. 2009); see also *Owner-Operator Independent Drivers Association, Inc. v. U.S. Department of Transportation*, 858 F.3d 980, 983, (5th Cir. 2017).

¹⁰ Regulations of the Department of Labor, Office of Workers’ Compensation Programs use similar language. See 20 C.F.R. § 726.314(c).

¹¹ 39 C.F.R. § 3010.160(b). In some cases, responses to motions must be filed on “such other deadline as the rules of practice provide or as the Commission or presiding officer may establish.” *Id.*

Respectfully submitted,

Katrina R. Martinez
Public Representative